SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1974

No. 73-1786

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth in Cause No. 17429, Wherein Henry G. Duckstein Was Appellant and General Dynamics Corporation, Fort Worth Division Was Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM 1974

No._____

HENRY G. DUCKSTEIN, *Petitioner*

v.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION, *Respondent*

Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth in Cause No. 17429, Wherein Henry G. Duckstein Was Appellant and General Dynamics Corporation, Fort Worth Division Was Appellee

Henry G. Duckstein respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, entered in this cause on September 21, 1973.

OPINION BELOW

The judgment of the 96th District Court of Tarrant County, Texas, in Cause No. 96-5206-70, rendering summary judgment in favor of General Dynamics Corporation, Fort Worth Division, was entered on January 15, 1973 (Appendix A, p. A-1).

The opinion rendered by the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, on September 21, 1973, affirming the summary judgment of the District Court, is reported at 499 S.W.2d 907 (Appendix B, p. A-3), and on October 19, 1973, the Court of Civil Appeals overruled Petitioner's Motion for Rehearing, 499 S.W.2d 907 (Appendix B, p. A-14).

On January 23, 1974, the Supreme Court of Texas refused Petitioner's Application for Writ of Error (No reversible error.) without opinion, 17 Tex. Sup. Ct. Jnl. 162 (Appendix C, p. A-15), and on March 6, 1974, the Supreme Court of Texas overruled Petitioner's Motion for Rehearing of the Application for Writ of Error, 17 Tex. Sup. Ct. Jnl. 225 (Appendix C, p. A-15).

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth was entered on September 21, 1973, and on October 19, 1973, the Court of Civil Appeals overruled Petitioner's Motion for Rehearing.

The Supreme Court of Texas refused (No reversible error.) timely Application for Writ of Error on January 23, 1974, and overruled Petitioner's Motion for rehearing on March 6, 1974.

The jurisdiction of the Supreme Court of the United States is invoked under United States Constitution, Article I, Section 8, Clause 3; United States Constitution, Aricle III, Section 2; Section 301(a) of the Labor

Management Relations Act, 29 U.S.C. § 185(a); and 28 U.S.C. § 1257(3).

At all times material to the controversy involved in this suit, Respondent was engaged in interstate commerce within the meaning of the Labor Management Relations Act 29 U.S.C. § 141, et seq. (Appendix D, p. A-17).

Question Presented

Do the existence of a weak union with a poor record and exclusive arbitration provisions in an employer-union contract result in a union member who has been wrongfully discharged and who has made reasonable efforts to cause the union to act on his behalf being unable to bring suit against the employer after the arbitration procedures have come to an unfavorable conclusion?

Statute Involved

The statute involved is Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a): "Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

Petitioner alleged that on May 27, 1967, he was an employee of Respondent and a member of Federated

Independent Texas Unions, Aircraft Local No. 900. About May 27 or 28 of 1967, Petitioner went to Mexico on a vacation. His vacation was to end, and he was to report back to work for Respondent, at 3:45 P.M. on June 6, 1967. While in Saltillo, Coahuila, Mexico, Petitioner had a sudden and painful attack of gout. On June 6, 1967, Petitioner sent a telegram to Respondent which stated, "I am reporting off: sick." On June 9, 1967, Petitioner's toenails were surgically removed in Hospital Civil de Saltillo (Saltillo Civil Hospital) in Saltillo, Coahuila, Mexico.

On June 23, 1967, Petitioner, in Fort Worth, Texas, learned that on June 6, 1967, Respondent had sent a telegram to Petitioner's address in Fort Worth, Texas, which read, "We have reason to believe that you are able to return to work. If you do not report for work by 7:00 A.M. on 8 June 1967 or furnish written medical proof of your inability to do so you will be terminated." Petitioner also learned that on June 15, 1967, a telegram had been sent to his home address in Fort Worth, Texas, which read, "This is to advise that you are being terminated effective 8 June for failure to furnish written medical proof of inability to work or report to work as instructed." Nobody had been at Petitioner's home in Fort Worth, Texas, to receive either telegram.

The opinion of the Court of Civil Appeals recites (499 S.W.2d 907, 908): "By deposition taken of plaintiff, a part of the record before the court on the defendant's Motion for Summary Judgment, it was established that he elected to resort to the machinery

provided by the contract between plaintiff's Union and the defendant company to have application in instances of grievance initiated against the company. It is undisputed that plaintiff caused the grievance procedure to be initiated. Testimony of plaintiff relative to subsequent action by him established that the processing of his grievance was, as a matter of law, ratified and adopted by him until such processing reached what is termed by the contract as the third stage. At such time memorandum agreed to by the Plant Grievance Committee representing the plaintiff's Union and a representative of the defendant company was made to reflect disposition of plaintiff's case as follows: 'Plant Grievance Committee, Stage Three. Date 16 August, 1967. Settlement of Grievance: Mr. Duckstein has not contacted the Company or the Union. Due to lack of information and cooperation from Mr. Duckstein, case closed.' "

The memorandum should be considered along with Petitioner's Affidavit in Opposition to Motion for Summary Judgment (Appendix E, p. A-18) in which he states, inter alia:

> "After my discharge by General Dynamics, I was refused admittance to the plant by the guards. I was unable to contact any of the union officers in the plant and I was unable to contact them elsewhere, because the union had no permanent headquarters.
>
> I was unable to obtain my personal belongings from inside the plant, and I was compelled to engage an attorney to aid me in recovering my goods from the plant.

> My only course by which I was able to contact the union was by phone. I explained the situation to Mr. Bart Lynch, acting union committeeman of our department, as soon as I became aware I had been discharged, and he assured me that a grievance would be filed on my behalf. I never abandoned my grievance or complaint . . ."
>
> "Dalton Miller states in his affidavit that he made attempts to contact me through fellow workers. But I never received word that Mr. Miller desired information from me . . ."
>
> "I cannot recall ever knowing a Mr. Creed . . ."

Respondent has never brought out what Petitioner could have done that he did not do, if anything, to exhaust his grievance procedure through the union.

PRESENTATION OF THE FEDERAL QUESTION

The federal question is, in essence, the application of Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) to the facts of this case.

Petitioner filed suit against Respondent in a District Court of Tarrant County, Texas. He plead the contract existent at all material times between his union and Respondent as a basis for his cause of action for damages for breach of such contract by Respondent.

In Plaintiff's Second Amended Original Petition Petitioner alleged, inter alia, on page four:

> "Due to lack of financial resources, lack of an independent operating base outside the premises of Defendant (the premises of Defendant being

> closed to the public), and apathy of its members at the time of Plaintiff's discharge and during the grievance procedure which was initiated pursuant thereto, although Plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedure set forth in the contract between Defendant and the union, the union could not have been expected to and did not offer substantial, independent, and forceful representation of Plaintiff and only perfunctorily pressed Plaintiff's claim."

Plaintiff's Response to Defendant's Motion for Summary Judgment (Appendix E, p. A-18) raises the issue of union weakness and the attempt by Petitioner to exhaust his remedies through the grievance procedure in the union agreement. The trial court ruled adversely to Petitioner (Appendix A, p. A-1). The issue of union weakness was raised in Petitioner's points of error in the Court of Civil Appeals and in the Supreme Court of Texas (Appendix F, p. A-27), and the Court of Civil Appeals and the Supreme Court of Texas ruled adversely on Petitioner's points (Appendices B, p. A-3 and C, p. A-15). Petitioner's Brief in Opposition to Motion for Summary Judgment, filed in the trial court, cited and quoted from *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580, (1964) and *Vaca v. Sipes, Administrator*, 386 U.S. 171, 87 S.Ct. 903, 13 L.Ed. 2d 580 (1966), which depend on the Labor Management Relations Act and in particular Section 301. These cases were also cited and quoted in Petitioner's brief in the Court of Civil Appeals and in the Petition for Writ of Error in the Supreme Court of Texas.

Reasons for Granting the Writ

In considering whether union representation has been fair, the courts ask whether the union has acted arbitrarily or in bad faith. But no United States Supreme Court case has been found which turns on the issue of union weakness. Thus, the cases of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L.Ed. 2d 580, 85 S.Ct. 614 (1964) and *Vaca v. Sipes, Administrator*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1966), while helpful, are not precisely in point.

Some idea of the structure of the labor movement may be gained from Appendix H, p. A-36.

Members of small, independent unions find themselves at a disadvantage, when the employer is large and powerful, as compared with members of large unions. In such a situation the policy of federal labor law contemplating a balance of power between unions and employers is thwarted.

The real parties in interest are the employers and employees. Unions owe their legal existence and power to the policy of the law which tries to balance the power of employees with that of employers. What guarantee does an employee have that what appear to be his contract rights under an employer-union contract will be of actual benefit to him? The only guarantee he has, it appears, is the strength of the union.

It might be thought that since the union was strong enough to get certain provisions into the contract, it should be strong enough to enforce them. But if an employer knew that a union was too weak to enforce the contract, the employer might not negotiate too

strongly at the bargaining table, if the contract were to contain an exclusive grievance procedure clause. It would be to the employer's advantage to make the union look good on paper. (The grievance procedure provisions contained in the employer-union contract in this case may be found in Appendix G, p. A-32).

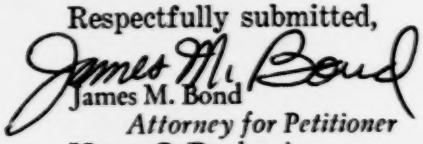
Some of the criteria which might be useful in determining union weakness are lack of an independent operating base outside the premises of the employer, especially where the premises of the employer are closed to the public, and a poor record of enforcement of contract provisions. In such cases, after an employee has attempted to use the contract grievance procedure, it would not seem inconsistent with the policy of the law to allow him to deal directly with the employer in the courts.

Conclusion

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Evidence of the union's weakness in this case may be found in Petitioner's Affidavit in Opposition to Motion for Summary Judgment, (Appendix E, p. A-21) and in Mart Lynch's Affidavit in Opposition to Motion for Summary Judgment (Appendix E, p. A-24).

Respectfully submitted,



James M. Bond
Attorney for Petitioner
Henry G. Duckstein
3023 East Rosedale Street
Fort Worth, Texas 76105

Certificate of Service

This is to certify that on or before the 24 day of May, 1974, a true and correct copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth was served upon the Hon. John H. McBryde, 1409 Schick Building, 210 West Sixth Street, Fort Worth, Texas 76102, counsel for Respondent, by depositing three copies thereof in a United States post office or mail box with first class postage prepaid, certified or registered return receipt requested, addressed to him at his foregoing last known address.

James M. Bond

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Henry G. Duckstein
3023 East Rosedale Street
Fort Worth, Texas 76105

APPENDIX A

IN THE
DISTRICT COURT OF TARRANT COUNTY,
TEXAS
96th JUDICIAL DISTRICT

NO. 96-5206-70

HENRY G. DUCKSTEIN

VS.

GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

JUDGMENT

Came on to be heard and considered the motion for summary judgment of General Dynamics Corporation, defendant in the above entitled and numbered cause, and appeared before the Court plaintiff, Henry G. Duckstein, by and through his attorney of record, and defendant, General Dynamics Corporation, by and through its attorney of record, and it appearing to the Court and the Court finds that said motion was duly filed, that the hearing thereon was duly scheduled and that plaintiff was duly served with a copy of said motion and was duly notified of the hearing thereon, the Court proceeded to hear and consider said motion, together with the pleadings, admissions, answers to interrogatories, two depositions and four affidavits on file herein, to hear argument of counsel and to consider

briefs submitted on behalf of each party, and, after having considered same, the Court is of the opinion and finds that the grounds of said motion are good and that said motion should be granted.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the motion for summary judgment of defendant, General Dynamics Corporation, should be and it is hereby granted in its entirety, and IT IS FURTHER ORDERED that Henry G. Duckstein, plaintiff, in this cause, have and recover nothing from General Dynamics Corporation, defendant in this cause, and IT IS FURTHER ORDERED that all costs herein be taxed against the plaintiff, for which execution may issue.

RENDERED AND SIGNED this the 15th day of January, 1973.

s/ Joe Spurlock
JUDGE PRESIDING

APPENDIX B

IN THE
COURT OF CIVIL APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

NO. 17429

HENRY G. DUCKSTEIN
APPELLANT
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION
APPELLEE

FROM THE DISTRICT COURT
OF TARRANT COUNTY

OPINION

The appeal is from a summary judgment granted on motion of the defendant General Dynamics Corporation, Fort Worth Division, against the plaintiff Henry G. Duckstein.

We affirm.

Plaintiff's allegations were that on May 27, 1967 he was a member of the Union which had a contract with the defendant affecting his interests as an employee of the defendant company; that at such time he went to Mexico on a vacation, upon termination of which he was to report back to work at 3:45 P.M. on June 6,

1967; that shortly prior to the time he was due to return to Fort Worth, Texas, his place of employment, he had a sudden attack of gout and that about June 4, 1967 his toenails became infected so that it was the advice of a Dr. Calderon, of Saltillo, Mexico, that his toenails should be surgically removed. Further, that on June 6, 1967 he sent a telegram to the defendant company reporting absence from work because of illness; that he visited the Hospital Civil de Saltillo in Saltillo, Mexico; that on June 8, 1967 he checked into the hospital and the following day had his toenails surgically removed.

Additional allegations were that on June 23, 1967 plaintiff was back home in Fort Worth and he learned that on June 6, 1967 the defendant company had sent a telegram to him at his Fort Worth address purporting to inform him that if he did not report for work by 7:00 A. M. on 8 June 1967 or furnish written medical proof of inability to do so his employment by defendant would be terminated. He also learned that on June 15, 1967 a telegram had been sent to his home address, which read: "This is to advise that you are being terminated effective 8 June for failure to furnish written medical proof of inability to work or report to work as instructed." No one had been present at plaintiff's home to receive them when the telegrams were sent. Thereafter plaintiff notified his Union of what had happened, but he could not immediately get proof from Mexico; further, that it was not customary for a sick employee to have to furnish a doctor's certificate if he missed only a few days of work.

By deposition taken of plaintiff, a part of the record

before the court on the defendant's Motion for Summary Judgment, it was established that he elected to resort to the machinery provided by the contract between plaintiff's Union and the defendant company to have application in instances of grievance initiated against the company. It is undisputed that plaintiff caused the grievance procedure to be initiated. Testimony of plaintiff relative to subsequent action by him established that the processing of his grievance was, as a matter of law, ratified and adopted by him until such processing reached what is termed by the contract as the third stage. At such time memorandum agreed to by the Plant Grievance Committee representing the plaintiff's Union and a representative of the defendant company was made to reflect disposition of plaintiff's case as follows: "Plant Grievance Committee, Stage Three. Date 16 August, 1967. Settlement of Grievance: Mr. Duckstein had not contacted the Company or the Union. Due to lack of information and co-operation from Mr. Duckstein, case closed."

On December 22, 1970 plaintiff filed suit against the defendant company in a District Court of Tarrant County, Texas. He plead the contract existent at all material times between his Union and the defendant as a basis for his cause of action for damages for breach of such contract on the part of the defendant company. He alleged damages in the amount of $49,-250.00 in consequence of wrongful discharge from employment.

In the trial court the defendant company moved for summary judgment. Upon the hearing a take-nothing summary judgment was rendered in behalf of the

defendant. The plaintiff appealed, and there was submission of the case to this appellate court.

On submission it appears from the arguments of both parties that there is no question but that the leading case applicable to the question of when a litigant in position of the plaintiff is entitled to maintain his cause of action in a suit filed for that purpose is Vaca v. Sipes, 386 US 171, 17 L ed 2d 842, 87 S Ct 903 (1967).

Beginning at page 854 (L. Ed.) of the opinion in Vaca v. Sipes is to be found the pertinent law applicable here. Pertinent paragraphs begin with that reading "However, if the wrongfully discharged employee himself resorts to the courts . . . ." Pertinent paragraphs conclude with citations of authorities, as follows: "See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich L Rev 1435, 1482-1501 (1963); Comment, Federal Protection of Individual Rights under Labor Contracts, 73 Yale LJ 1215 (1964 . . . ."

The foregoing, in Vaca v. Sipes, states the general rule: Grievance procedures contracted upon by the employer and the union which represents the employee are the employee's exclusive method by which he must seek redress if so provided by the Company-Union Contract and the employee may not maintain a suit to litigate his controversy against the employer until such grievance procedures have been exhausted. The court also proceeds to demonstrate when the rule will be to the contrary because of a breach of the contract

by the employer or a breach of duty owing to him by the union to fairly prosecute his grievance. In light thereof we consider the situation in the instant case in a test to decide whether, within contemplation of law, there is reason to depart from the general rule so as to permit plaintiff to maintain his suit against the employer for damages for wrongful discharge from employment without having exhausted grievance procedures so contracted. Actually this being an appeal from a summary judgment granted the defendant, the test is whether defendant's proof established as a matter of law that plaintiff cannot by evidence make out a prima facie case.

For the purpose of arriving at answer we may, and will, presume that the defendant had wrongfully discharged plaintiff. Thereupon the plaintiff invoked the quasi-judicial process contractually provided by the contract agreed upon by and between the union of which he was a member and the defendant which was his employer. There would have been no cause of action for wrongful discharge but for the agreement mentioned; it is solely because there was such, and because of the provisions of that contract, that discharge of the plaintiff from his employment might be said to have given rise to such character of action.

The contract, in its essential particulars, provided that the employer and the union might settle a grievance filed on behalf of an employee at any of four "stages", the last stage being arbitration procedure in the event the dispute occasioning prosecution of a grievance not be settled at stage three or some earlier stage; and further provided that if the grievance be

not certified beyond stage three within 30 days after there is a decision thereat the grievance should be considered closed on the basis of such decision. Already stated was the decision and settlement of plaintiff's grievance at such stage of the grievance procedure, to-wit: "Mr. Duckstein has not contacted the Company or the Union. Due to lack of information and co-operation from Mr. Duckstein, case close." The contractual grievance procedure included the provision, as follows: "Settlement of grievances can be reached by the Company and the Union at any stage without the acquiescence of any individual employe who may be affected directly or indirectly by such settlement." By Vaca v. Sipes it appears settled that such a contractual provision is binding and proper.

Though timely notified of the closing of the case based on his grievance the plaintiff did nothing. He had secured other employment about this time. He did not insist upon the Union processing his grievance beyond stage three, nor did he even request that such be attempted. He filed suit against the defendant December 22, 1970, after elapse of more than three years.

By his points of error plaintiff presents his case as one wherein the Union of which he was a member was weak and ineffective and not able to offer reasonable representation of him in his claim that his discharge from employment was wrongful; that under these circumstances it would be ridiculous to require that he "go through the motions" of the grievance procedure provided by the contract before resorting to the courts. Further, that the trial court erred in granting the defendant's motion for summary judgment because

there was more than a scintilla of evidence that the Union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the Union was so weak and ineffective as to make reliance on the Union's efforts ridiculous.

Plaintiff cites, in addition to *Vaca*, the case of Republic Steel Corp. v. Maddox, 379 US 650, 13 L ed 2d 580, 85 S Ct 614 (1965). In that case Maddox brought suit in an Alabama state court against his employer for severance pay allegedly owed under the terms of the collective bargaining agreement existing between the employer and Maddox' union. Maddox made no effort to utilize the grievance procedure provided in such agreement. He was upheld in a judgment he obtained through the Alabama Supreme Court. A Writ of Certiorari was granted by the United States Supreme Court. In the opinion of that Court it was written: (p. 583, 13 L. Ed.)

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. (Footnote omitted.) If the union refuses to press or only perfunctorialy presses the individual's claim, differences may arise as to the forms of redress then available."

The holding of the United States Supreme Court in Republic Steel Corp. v. Maddox was one which reversed the Alabama courts upon a holding that in neither the facts nor the pleadings had Maddox shown

that he could not have availed himself of the grievance procedure provided by the contract of his union with his employer. By reason thereof the holding was that he was not by his suit entitled to the judgment for severance pay granted him by the Alabama judgment.

Plaintiff additionally cites Kaufman v. Goldberg, 315 N.Y.S. 2d 35, (Sup. Ct., Kings County, 1970), in which it is stated (p. 42) as follows:

"... There is however, a line of cases in other jurisdictions which imposes on a union the duty of fair representation to its members and that the violation of that duty permits the employee to proceed directly against the employer. The authorities are exhaustively researched and discussed in Jenkins v. Schluderberg-T, etc., Co., 217 Md. 556, 144 A. 2d 88, (see 45 Corn. L. Q. 25). In *Jenkins*, the court held that where the union acted in an arbitrary and discriminatory manner in failing to proceed on behalf of the employee against the employer, the employee may proceed directly. The court quoted (at pp. 564-565, 144 A. 2d at p. 93) from the article by Professor Cox in 69 Harvard Law Review 601, 652:

" ' "While the rule which bars an individual employee from bringing an action on the contract when the union is unwilling to take the case to arbitration is sound if the union has made an adjustment or is satisfied that the grievance lacks merit, nevertheless it would work injustice in situations where the union is unwilling to press the claim because of indifference or reluctance to suffer the expense. . . ." ' "

Based upon the foregoing, which as applied to the

case cited constituted dictum merely, the plaintiff advances the proposition and theory that "Conceivably a union could be so weak as to be a farce and make enforced reliance on its efforts ridiculous." Plaintiff furthermore contends "the evidence offered in the two Affidavits in Opposition to Defendant's Motion for Summary Judgment raise more than a scintilla of evidence that the union was so weak that to force an employee to rely on it and have no recourse in the courts would result in great injustice."

The defendant has countered this argument by the claim that what plaintiff is contending is a "yes, but" plea as in confession and avoidance, which has not been made a part of plaintiff's pleadings. We do not need to refer to the pleadings to verify since this is a summary judgment case. In such a case the omission of an affirmative defense in respondent's pleading will not waive the defense, and his opponent's motion for summary judgment is properly denied when the record raises (or leaves raised) a material fact issue with respect to such affirmative defense. Bachman Center Corporation v. Sale, 359 S. W. 2d 290 (Dallas Civ. App., 1962, writ ref., n.r.e.); 4 McDonald, Texas Civil Practice (1971 Rev.) Ch. XVII "Judgments", p. 180, Sec. 17.26.12 "(Summary Judgments) (IV) Determination of Motion".

In such an instance the burden is upon plaintiff to raise by evidence a fact issue upon such affirmative defense in opposition to the defense of defendant once it has been established. "Moore" Burger, Inc. v. Phillips Petroleum Company, 492 S. W. 2d 934 (Tex. Sup., 1972). In *"Moore" Burger* the affirmative defense was

that of promissory estoppel, advanced in the effort to avoid the defendant's reliance upon the statute of frauds applicability of which was established as a matter of law.

In a test of the evidence produced by the plaintiff in the attempt to raise an issue of his affirmative defense to defendant's own defense, established as a matter of law, it is observed that the evidence has probably raised the issue of weakness and ineffectiveness of the Union. What such evidence does not raise, however, is an issue of the Union's breach of the statutory duty of fair representation, i.e. a showing that evidence exists that the Union's purported representation of plaintiff was "arbitrary, discriminatory, or in bad faith." In Vaca v. Sipes the Supreme Court took occasion to hold that exactly this is required in order to show that a union has breached its duty of fair representation of the union member. The other cases mentioned as cited by the plaintiff do not qualify or change the holding. Thus if plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court.

It takes little legal analysis to realize that to depart from the aforementioned requirement that the evidence raise the issue that union action (or non-action) was "arbitrary, discriminatory, or in bad faith" would be to substantially destroy the effectiveness of griev-

ance procedures commonly provided by union contracts.

Except for the extended expiration of time since the event giving rise to plaintiff's complaint it might be that it would be better to modify the trial court's judgment so as to decree that the action be dismissed. Lindsey v. General Dynamics Corporation, 450 S. W. 2d 895 (Waco Civ. App., 1970, no writ history). Here no benefit to plaintiff could accrue by such reformation.

Judgment is affirmed.

/s/ Frank A. Massey
Frank A. Massey
Chief Justice

SEPT. 21, 1973

THE STATE OF TEXAS
COUNTY OF TARRANT

I, Lida Swanson, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, certify that the foregoing is a full, true and correct copy of the opinion delivered by said Court on the 21st day of September, 1973, in the above numbered and entitled cause.

Given under my hand and seal of the Court of Civil Appeals on this the 30th day of April, A.D., 1974.

/s/ Lida Swanson
Clerk

[SEAL]

October 19, 1973

Henry G. Duckstein
18990-17429 vs.
General Dynamics Corporation,
Fort Worth Division

This day came on to be heard motion by appellant for a rehearing in this cause, and said motion having been duly considered by the Court is hereby overruled.

* * * * *

THE STATE OF TEXAS
COUNTY OF TARRANT

I, Lida Swanson, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, certify that the foregoing is a full, true and correct copy of the order overruling the motion for rehearing on October 19, 1973, in the above numbered and entitled cause.

Given under my hand and seal of the Court of Civil Appeals on this the 30th day of April, A.D. 1974.

/s/ Lida Swanson
Clerk

[SEAL]

APPENDIX C

IN THE
SUPREME COURT OF TEXAS

January 23, 1974

No. B-4308.

Henry G. Duckstein
vs.
General Dynamics Corporation,
Fort Worth Division

From Tarrant County,
Second District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Henry G. Duckstein, pay all costs incurred on this application.

March 6, 1974.

No. B-4308.

Henry G. Duckstein
vs.
General Dynamics Corporation,
Fort Worth Division

From Tarrant County,
Second District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 6th day of May, 1974.

GARSON R. JACKSON, Clerk
/s/ Eugene Cervenka, Deputy.
Eugene Cervenka

APPENDIX D

In its Brief In Support of Motion for Summary Judgment in the trial court Respondent stated on page 1: "By response to defendant's second set of requests for admissions, plaintiff admits that at all times material to the controversy involved in this suit, defendant was engaged in interstate commerce within the meaning of the Labor Management Relations Act, 29 U.S.C., Sec. 141, et seq."

On page three of this brief Respondent stated: "By virtue of being subject to the Labor Management Relations Act, the relations of the parties with respect to the particular point under discussion are governed by federal law."

On page five of this brief Respondent stated "Should there remain any question about the applicability of federal law to the breach of union contract claim that plaintiff is making in this case, it would be removed by the clear statement of the Supreme Court in *Republic Steel Corp.* that:

> "Federal law governs 'Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter. . . .' Section 301(a) of the LMRA, 29 USC § 185(a) (1958 ed), Textile Workers v. Lincoln Mills, supra. The suit by Maddox clearly falls within the terms of the statute and within the principles of Lincoln Mills, and because we see no reason for creating an exception, we conclude that the general federal rule applies."

APPENDIX E

NO. 96-5206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Henry G. Duckstein, Plaintiff in the above styled and numbered cause, and makes this response to Defendant's Motion for Summary Judgment, relying on all pleadings, depositions, admissions, answers to interrogatories and affidavits on file herein and to be filed herein within the time prescribed by law, including the affidavits of Henry G. Duckstein and Bart Lynch filed herewith. The record thus made establishes that there are issues as to material facts and that Defendant is not entitled to judgment as a matter of law for the following reasons:

A. 1. Since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defend-

dant, plaintiff is not limited to the grievance procedures in the union agreement.

A. 2. Alternatively, Plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement, and inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, plaintiff is not limited to the grievance procedures in the union agreement.

A. That plaintiff attempted to use the grievance procedure in the union agreement was not such an "election" as to bind him to the results of the grievance procedure and preclude his taking other legal avenues of approach.

C. 1. Plaintiff is not precluded by the union agreement from bringing this lawsuit, inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant.

C. 2. Alternatively, plaintiff is not precluded by the union agreement from bringing this lawsuit, inasmuch as the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, and plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement.

D. Plaintiff did not abandon or fail to pursue said grievance. Plaintiff made a good faith and

reasonable attempt to exhaust his remedies through the grievance procedure in the union agreement.

E. 1. Plaintiff has standing to bring this suit even though the union agreement provides that the union will be the sole and exclusive representative of the individual members, since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant.

E. 2. Alternatively, plaintiff has standing to bring this suit even though the union agreement provides that the union will be the sole and exclusive representative of the individual members, since the union was weak and did not offer more than a perfunctory prosecution of plaintiff's claim of wrongful discharge by defendant, and plaintiff made a good faith and reasonable attempt to exhaust his remedies through the grievance procedures in the union agreement.

F. Plaintiff made a good faith and reasonable attempt to exhaust the remedies available to him under the grievance procedures in the union agreement.

G. Plaintiff's claim, to the extent plaintiff might contend that all or some part of his claim is not based on the union agreement, is not barred by the statute of limitations.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that defendant's Motion for Summary Judg-

ment be in all respects overruled.

Respectfully submitted,

/s/ James M. Bond
James M. Bond
Attorney for Plaintiff
3023 East Rosedale Street
Fort Worth, Texas 76105
534-1401

NO. 96-3206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:

That before me, the undersigned authority, on this date personally appeared Henry G. Duckstein, who, after having been duly sworn by me, upon his oath deposed and said as follows:

"My name is Henry G. Duckstein, and I am plaintiff in the above styled and numbered cause. I reside at 4316 Ramey, Fort Worth, Texas, but I am presently employed in Brownsville, Texas. I am a former employee of General Dynamics Corporation, Fort Worth Dvision, Defendant in the above styled and numbered cause. I was employed from 1954 until my discharge in 1967. During my employment I was represented by the Federated Independent Texas Union (FITU). It was common knowledge that members of the reputable CIO-AFL union referred to FITU as a company-union.

After my discharge by General Dynamics, I was refused admittance to the plant by the plant guards. I was unable to contact any of the union officers in the plant and I was unable to contact them elsewhere, because the union had no permanent headquarters.

I was unable to obtain my personal belongings from inside the plant, and I was compelled to engage an attorney to aid me in recovering my goods from the plant.

My only course by which I was able to contact the union was by phone. I explained the situation to Mr. Bart Lynch, acting union committeeman of our department, as soon as I became aware I had been discharged, and he assured me that a grievance would be filed on my behalf. I never abandoned my grievance or complaint.

In the summer of 1961, I was given a three day lost-pay layoff. I filed a grievance with the union to have the lost pay restored. Although I presented the union

with documentary proof of my innocence, I still lost the case. The union cooperated with the company's request.

In the summer of 1966 the company had adopted a method whereby some of the work in Dept. 24-2 was being transferred to another department. This was a contract violation. Even after five grievances were filed to stop this practice the company ignored the grievances. The union lost these five cases.

I filed a grievance in the early part of 1967 to compel the company to equalize overtime as per union contract, but the union backed down when the grievance got to the third stage and they forfeited the case.

The union was so weak that it was able to win less than 10% of its cases.

Dalton Miller states in his affidavit that he made attempts to contact me through fellow workers. But I never received word that Mr. Miller desired information from me. As Chairman of the Grievance, he was the only official with authority to argue my case. If Mr. Miller's statement that he was unaware of my discharge is true, then General Dynamics violated another provision of the contract which states that the union will be informed immediately if any drastic action is taken against any union member.

I cannot recall ever knowing a Mr. Creed. His statements that I contacted him by phone and imparted confidential information of my private life are untrue.

I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Further affiant sayeth not.

/s/ Henry G. Duckstein
Henry G. Duckstein

SUBSCRIBED AND SWORN TO Before me this 4th day of November, 1972.

/s/ Monette S. Fugate
Monette S. Fugate
Notary Public in and for
Tarrant County, Texas

NO. 96-5206-70

IN THE DISTRICT COURT
96th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

HENRY G. DUCKSTEIN
VS.
GENERAL DYNAMICS CORPORATION,
FORT WORTH DIVISION

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL MEN BY THESE PRESENTS:

That before me, the undersigned authority, on this

day personally appeared Bart Lynch, who, after having been duly sworn by me, upon his oath deposed and said as follows:

"My name is Bart Lynch, and I reside at 340 West Hallmark Drive, Fort Worth, Texas. I was employed by General Dynamics Corporation, Fort Worth Division, about 1963 and continued my employment there until some time after Henry G. Duckstein's discharge. I was a member of Federated Independent Texas Unions, Aircraft Local No. 900, the same union of which Henry G. Duckstein was a member, and I became an officer in this union. At all times during my employment by General Dynamics Corporation, Fort Worth Division, the Federated Independent Texas Union was a so-called Company-union. It was not affiliated with any of the International Unions, thus it was not able to obtain free legal advice or financial aid in time of need. If a costly arbitration decision threatened as the last means to settle a grievance, the union generally would drop the grievance and lose the case.

Although the FITU contract provided for equalization of premium paid overtime work, the union was never able to compel the company to comply with this provision.

I have knowledge of more than ten grievances being filed in 1965 to have this discriminatory condition corrected but the union lost every case.

The top union officers were untrained and lacked college orientation, thus, they were no match for General Dynamic's highly efficient labor relations person-

nel. The result was that the great majority of the cases were won by the company.

The FITU operated on a shoestring. It had no permanent headquarters, consequently it was very difficult to contact the union officials. Its records were haphazardly kept at the union secretary's home. And the union had very little financial resources.

Since I was Acting Committeeman at the time of Henry G. Duckstein's discharge, Henry G. Duckstein contacted me and explained the situation soon after his discharge.

I have personal knowledge of the facts stated in this affidavit and can testify thereto."

Futher affiant sayeth not.

/s/ Bart Lynch
Bart Lynch

SUBSCRIBED AND SWORN TO Before me this 4th day of November, 1972.

/s/ Monette S. Fugate
Monette S. Fugate
Notary Public in and for
Tarrant County, Texas

APPENDIX F

Petitioner's points of error in the Court of Civil Appeals were as follows:

POINT ONE

If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from resorting to the courts after the union's efforts on his behalf have failed.

POINT TWO

If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

POINT THREE

The court below erred in granting appellee's motion for summary judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

Petitioner's points of error in Petition for Writ of Error in the Supreme Court of Texas were as follows:

POINTS OF ERROR

POINT ONE

The Court of Civil Appeals erred in overruling Petitioner's Point One, reading as follows:

> If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from resorting to the courts after the union's efforts on his behalf have failed.

POINT TWO

The Court of Civil Appeals erred in overruling Petitioner's Point Two, reading as follows:

> If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

POINT THREE

The Court of Civil Appeals erred in overruling Petitioner's Point Three, reading as follows:

> The court below erred in granting Appellee's Motion for Summary Judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

POINT FOUR

The Court of Civil Appeals erred in holding that the test with regard to whether the union had breached its duty of fair representation was whether "the union's purported representation of Plaintiff was 'arbitrary, discriminatory, or in bad faith.' "

POINT FIVE

The Court of Civil Appeals erred in holding that "if Plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court."

POINT SIX

The Court of Civil Appeals erred in holding or assuming that Petitioner did not exhaust grievance procedures under the contract.

Petitioner's points of error in Motion for Rehearing in the Supreme Court of Texas were as follows:

This Honorable Court erred in not granting the application for writ of error on the First Point of Error which reads:

> If a union is so weak and ineffective as not to be able to offer reasonable representation to its members, a member should not be precluded from sorting to the courts after the union's efforts on his behalf have failed.

This Honorable Court erred in not granting the

application for writ of error on the Second Point of Error which reads:

> If a union is so weak and ineffective as to make reliance on the union's efforts ridiculous, an employee should not be barred from the courts because of the union's existence nor required to go through the motions of the union grievance procedure before resorting to the courts.

This Honorable Court erred in not granting the application for writ of error on the Third Point of Error which reads:

> The court below erred in granting Appellee's Motion for Summary Judgment because there was more than a scintilla of evidence that the union was so weak and ineffective as not to be able to offer reasonable representation to its members and/or that the union was so weak and ineffective as to make reliance on the union's efforts ridiculous.

This Honorable Court erred in not granting the application for writ of error on the Fourth Point of Error which reads:

> The Court of Civil Appeals erred in holding that the test with regard to whether the union had breached its duty of fair representation was whether "the union's purported representation of Plaintiff was 'arbitrary, discriminatory, or in bad faith.' "

This Honorable Court errer in not granting the application for writ of error on the Fifth Point of Error which reads:

The Court of Civil Appeals erred in holding that "if Plaintiff has merely raised only an issue of union weakness and ineffectiveness in presenting his grievance he has failed to raise the issue of that breach of duty requisite to be shown in justification of his resort to litigation in the District Court."

This Honorable Court erred in not granting the application for writ of error on the Sixth Point of Error which reads:

The Court of Civil Appeals erred in holding or assuming that Petitioner did not exhaust grievance procedures under the contract.

APPENDIX G

SECTION XII

GRIEVANCE PROCEDURE

1. The parties agree that unfairness to employes shall not exist and no employe shall be discriminated against for using the Grievance Procedure hereinafter set forth.

2. For purposes of this Agreement, a "grievance" shall be defined as any alleged violation of the terms or provisions of this Agreement or difference of opinion as to its interpretation and/or application, when reduced to writing on a form approved by the parties. Grievances shall be presented in writing signed by the aggrieved employe and his Departmental Committeeman, except that grievances relating to matters general in character which cannot be settled by an immediate supervisor or department head shall be valid when signed by a member of the Union's Plant Committee and submitted to the Director of Industrial Relations, if originating with the Union. Complaints or charges against the Union originating with the Company may also be known as grievances and shall be valid when signed by the Director of Industrial Relations and submitted to the Chairman of the Union's Plant Committee.

Settlement of grievances can be reached by the Company and the Union at any stage without the acquiescence of any individual employe who may be affected directly or indirectly by such settlement.

3. A grievance to be valid must be submitted with-

in five (5) working days after the aggrieved knew or by reasonable diligence could have known of the occurrence of the act or omission upon which it is based except as otherwise provided for herein. In cases of discharge or layoff of any nature, the grievance to be valid must be filed within two (2) working days from the time the employe leaves the plant, it being further understood and agreed, however, that no employe shall be required to leave the plant upon discharge, disciplinary layoff or suspension without being permitted to discuss his case in the presence of his Committeeman if the employe so requests.

4. Subject to the requirements of this Section in respect to the handling of grievances, any individual employe may present a request or complaint directly to his immediate supervisor.

5. Stage One

An aggrieved employe and/or his Committeeman may present and attempt to settle a grievance with the employe's immediate supervisor during working hours. This supervisor shall give his written answer within one (1) working day thereafter.

6. Stage Two

Failing a satisfactory settlement in Stage One, the aggrieved employe and/or his Committeeman within one (1) working day thereafter may take the grievance up with the department superintendent or department head, who shall give his written answer three (3) working days thereafter.

7. Stage Three

If a satisfactory answer does not result from Stage One and Stage Two, then the grievance may be referred to the Director of Industrial Relations and will be scheduled for the next regular weekly meeting with the Union Plant Committee. Such meetings will be held weekly on Wednesday between the hours of 1:30 p.m. and 3:30 p.m. when there are unsettled grievances filed with the Company for this Stage, twenty-four (24) hours in advance of said meeting.

8. Failure of the moving party to process a grievance within any of the time limitations specified in Stages One, Two and Three, shall render the grievance closed and settled on the basis of the last decision given. If a grievance is not answered within the time limits specified in each Stage, it shall be deemed to move to the next Stage unless the parties agree to extend the time.

9. Stage Four—Arbitration

If the parties fail to reach a satisfactory settlement in Stage Three within thirty (30) days, then within nine (9) working days thereafter, the grievance may be certified to Stage Four, and if not certified to Stage Four within such limitations shall be considered closed on the basis of the decision given in Stage Three.

10. The parties may select an arbitrator by mutual agreement. Failing to agree to an arbitrator within thirty (30) days, the parties shall request the Federal Mediation and Conciliation Service to furnish a list

of five (5) names from which the parties shall select an arbitrator within five (5) working days from receipt of the list, by agreement, or, failing to agree, by alternately striking names from the list.

11. The arbitration hearing shall be held within ten (10) days after the Arbitrator has been selected unless it is agreed otherwise, by the parties, due to just cause affecting either party.

12. The Arbitrator shall not have jurisdiction to arbitrate new provisions or new clauses into this Agreement, nor to add to, nor to modify, nor to arbitrate away in whole or in part any provisions of this Agreement. The Arbitrator's decision shall be submitted in writing and shall be binding on both parties. Notice of any claims by either party that an Arbitrator's Award hereafter rendered hereunder is invalid in whole or in part, under the laws of Texas, shall be served in writing upon the other party within ten (10) days after receipt of the written award in question, and thereafter the party giving such notice shall proceed as promptly as possible with the institution of proceedings, seeking to modify or set aside the award. The parties agree that if such notice is not given, such failure shall constitute a waiver of any legal objections to said award.

13. The expense of arbitration including the fee of the Arbitrator and any other necessary expenses shall be borne equally between the Company and the Union.

APPENDIX H

In the Directory of National Unions and Employee Associations 1971, Bulletin 1750, U. S. Department of Labor, Bureau of Labor Statistics 1972, the latest issue available, may be found the following words on page 63: "A total of 200 organizations—175 classified as unions and 25 as professional and State employee associations—are listed in this directory. AFL-CIO affiliates accounted for 114 of the unions, another 61 unions were unaffiliated. Approximately 9 percent of the combined membership was represented by associations; members of unions affiliated with the AFL-CIO represented approximately 77 percent of total union membership."

On pages 66 and 67 of the same publication we read under the heading of *Unaffiliated or Independent Unions:*

"A total of 65 national or international unions not affiliated with the AFL-CIO were known to the Bureau in 1970. All of the unaffiliated unions, other than those organizing government employees, reported agreements covering different employers in more than one State. (Footnote omitted.) The combined membership of these unions for 1970 was estimated at 4.8 million . . .

"Unaffiliated local unions are generally confined to a single establishment, employer, or locality, and therefore do not meet the Bureau's interstate definition of national unions, used in compiling this and previous directories. A 1967 Bureau survey showed about

475,000 members in 884 unaffiliated local unions. According to the Bureau's findings, these local independent unions represented approximately 2.3 percent of the total 1970 union membership in the United States."